## Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–161 OF 2007
GOPAL SRI RAM, ABDULL HAMID EMBONG AND ZAINUN ALI JJCA
30 JANUARY 2008

B

*Civil Procedure — Rules of court — Whether High Court's refusal to accept purported tender for settlement of taxed costs 'unreasonable, unfair and without basis'*

C

*Companies and Corporations — Winding up — Petition — Whether affidavit in opposition necessary — Companies (Winding Up) Rules 1972 r 30(1)*

D

*Companies and Corporations — Winding up — Service of notice pursuant to s 218 of the Companies Act 1965 — Whether High Court correct in exercising discretion to refuse proposed tender for settlement and allowed winding up of appellant*

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On 5 September 2005, the respondent/petitioner served a s 218 of the Companies Act 1965 notice on the appellant requiring the latter to pay up certain taxed costs due to the respondent. However, following the appellant's refusal to respond to the said notice, the respondent presented a winding up petition against the appellant. The petition debt was a sum pursuant to an allocator plus interest arising from taxed costs due from the appellant to the respondent from the Federal Court. The respondent further supported the petition on account of further taxed costs due at the High Court and the Court of Appeal being proceedings connected with the Federal Court appeal. These were evinced in the creditors' debt in the list of parties who had given notice to attend the hearing of the petition. The appellant did not file an affidavit in opposition. However, on the eve of the hearing date of the petition at the High Court, the appellants gave a notice of appointment of solicitors and also stated its willingness to settle the taxed costs (the purported tender of settlement) at the Federal Court and High Court levels. As regards the taxed costs at the Court of Appeal, the appellant sought an adjournment to seek instructions, to which the High Court refused. The appellant did not dispute its insolvency. It merely rested its application on the purported tender of settlement.

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**Held**, dismissing the appeal with costs:

(1) The exercise of the High Court's discretion in rejecting the purported settlement on the very day of the hearing of the petition and its refusal for an adjournment, was not wrong (see para 7).

(2) The appellant was required by law to file an affidavit in opposition to the petition, which it had not done despite having ample time (more than five months). An affidavit in opposition is crucial as this would form the basis for the winding up court to make any appropriate orders (see paras 9 & 11).

(3) A petitioner was entitled to refuse a last minute tender to settle the petitioned debt assuming that there was indeed a valid tender offered. In the instant case, the respondent in this case had every right not to accept the purported tender. Furthermore, there was also the question of the costs indebted to the respondent at the Court of Appeal as stated in the affidavit of debt in the list of parties attending the hearing of the petition. The purported tender made by the appellant did not include this debt, thus rendering it as not a valid tender. Under the circumstances, the appeal could not be allowed and the order of the High Court affirmed (see paras 14–15).

**[Bahasa Malaysia summary**

Pada 5 September 2005, responden/pempetisyen menyerahkan notis di bawah s 218 Akta Syarikat 1965 kepada perayu menghendaki perayu membayar sejumlah kos dicukai yang terhutang kepada responden. Walau bagaimanapun, berikutan keengganan perayu untuk menjawab notis tersebut, responden menyerahkan petisyen penggulungan terhadap perayu. Hutang petisyen adalah jumlah berikutan alokatur termasuk faedah berbangkit dari kos dicukai yang perlu dijelaskan oleh perayu kepada responden dari Mahkamah Persekutuan. Responden selanjutnya menyokong petisyen tersebut berdasarkan kos dicukai tambahan iaitu RM17,654.08 di Mahkamah Tinggi dan di Mahkamah Rayuan yang merupakan prosiding-prosiding berkaitan dengan rayuan Mahkamah Persekutuan. Ini diperlihatkan dalam hutang pemiutang-pemiutang dalam senarai pihak-pihak yang telah memberikan notis untuk menghadiri perbicaraan petisyen tersebut. Perayu tidak memfailkan afidavit bantahan. Walau bagaimanapun, sebelum hari perbicaraan petisyen di Mahkamah Tinggi, perayu memberikan notis pelantikan peguamcara dan juga menyatakan kesanggupannya untuk menyelesaikan kos dicukai (tawaran untuk penyelesaian) di peringkat Mahkamah Persekutuan dan Mahkamah Tinggi. Berkenaan kos dicukai di Mahkamah Rayuan, perayu memohon penangguhan untuk mendapatkan arahan, yang ditolak oleh Mahkamah

Tinggi. Perayu tidak mempertikaikan kemuflisannya. Ia hanya menyandarkan permohonannya ke atas tawaran untuk penyelesaian.

**Diputuskan**, menolak rayuan dengan kos:

(1) Pelaksanaan budi bicara Mahkamah Tinggi dalam menolak penyelesaian bermaksud tersebut pada hari perbicaraan petisyen dijalankan dan penolakannya untuk penangguhan adalah tidak salah (lihat perenggan 7).

(2) Perayu dikehendaki oleh undang-undang untuk memfailkan afidavit membantah petisyen tersebut yang ia tidak lakukan walaupun mempunyai masa yang banyak (lebih daripada lima bulan). Afidavit bantahan adalah penting kerana ia membentuk asas kepada mahkamah penggulungan membuat arahan-arahan yang sewajarnya (lihat perenggan 9 & 11).

(3) Seseorang pempetisyen berhak untuk menolak tender di saat terakhir bagi menyelesaikan hutang yang dipetisyen dengan menganggap bahawa terdapat satu tender yang sah telah ditawarkan. Dalam kes ini, responden mempunyai setiap hak untuk tidak menerima tender yang dimaksudkan itu. Malahan terdapat juga persoalan berkenaan kos terhutang kepada responden di Mahkamah Rayuan seperti yang tertera di dalam afidavit hutang dalam senarai pihak-pihak yang menghadiri perbicaraan petisyen tersebut. Tender yang dimaksudkan yang dibuat oleh perayu tidak mengambilkira hutang ini, dengan itu menjadikannya tender yang tidak sah. Dalam keadaan ini, rayuan tersebut tidak dibenarkan dan perintah Mahkamah Tinggi disahkan (lihat perenggan 14–15).]

**Notes**

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed 2006 Reissue) paras 1321–1456.

For cases on rules of court in general, see 2(1) *Mallal's Digest* (4th Ed 2007 Reissue) paras 6121–6130.

For cases on service of notice pursuant to s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed 2006 Reissue) paras 1509–1510.

**Cases referred to**

*Australian Mid-Eastern Club Ltd v Yassim* (1989–1990) ACSR 403 (refd)

*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 (refd)

*Occidental Life Insurance Co of Australia Ltd v Life Style Planners Pte Ltd* (1992) 111 ALR 261 (folld)

**Legislation referred to**

Companies (Winding Up) Rules 1972 r 30(1), 30(2)
Companies Act 1965 ss 218, 226(4)

**Appeal from**: Companies Winding Up Petition No MT4–28–311 of 2005 (High Court, Shah Alam)

*TY Teh (Darwinder Singh and Apprao with him) (TY Teh & Partners) for the appellant.*

*Logan Sabapathy (Tharminder Singh and S Bhuvaneswary with him) (Logan Sabapathy & Co) for the respondent.*

**Abdull Hamid Embong JCA (delivering judgment of the court):**

**[1]** On 5 September 2005 the respondent (petitioner in the High Court) served a s 218 notice to the appellant requiring the latter to pay up a certain taxed costs due to the respondent. The appellant did not respond to that statutory notice.

**[2]** On 16 December 2005 the respondent presented a winding-up petition against the appellant which was fixed for hearing on 26 May 2006. The petition debt was a sum of RM103,487.20 pursuant to an allocator plus interest arising form taxed costs due from the appellant to the respondent from the Federal Court (Federal Court Civil Appeal No 02–5–2003).

**[3]** The respondent further supported the petition on account of further taxed costs due namely for RM17,654.08 at the High Court and RM106,869.33 at the Court of Appeal being proceedings connected with the Federal Court appeal. These were envinced in the creditors' debt in the list of parties who had given notice to attend the hearing of the petition.

**[4]** No affidavit in opposition was filed by the appellant. However at 3.27pm on the eve of the hearing date of the petition the appellants' solicitors by letter dated 25 May 2007 gave a notice of appointment of solicitors and also stated its willingness to settle the taxed costs (the purported tender) at the Federal Court and High Court levels. As regards the taxed costs at the Court of Appeal, the appellant sought an adjournment to seek instructions, to which the High Court refused.

**[5]** It may be noted here that the appellant is not disputing its insolvency. It merely rested its application on the purported tender of settlement.

**[6]** The grounds of this appeal is against the High Court's refusal to accept the purported tender for settlement which the appellant now contends as being 'unreasonable, unfair and without basis'. A

**[7]** We have considered the exercise of the High Court's discretion in rejecting the purported settlement on the very day of the hearing of the petition and its refusal for an adjournment, and found that decision had, in the circumstances, not been wrong. B

**[8]** We reiterate the legal position that the appellant is required in law to file an affidavit in opposition to the petition, which it had not done. C

Rule 30(1) of the Companies (Winding Up) Rules 1972 spells out this legal requirement, stating:

> 30(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition. D

**[9]** The appellant had ample time of over five months from the date the petition was presented ie 16 December 2005 to file its affidavit in opposition. E

**[10]** This court had in the case of *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756 held that r 30(1) of the 1972 Rules is mandatory in nature and that there must be strict compliance with it. F

**[11]** An affidavit in opposition is crucial as this would form the basis for the winding up court to make an appropriate order (see r 30(2)).

**[12]** We are in agreement with the respondent that a petitioner is entitled to refuse a last minute tender to settle the petitioned debt, even assuming that there was indeed a valid tender proffered. This passage from the Supreme Court of New South Wales was referred to us as authority on this point, in the case of *Australian Mid-Eastern Club Ltd v Yassim* (1989–1990) ACSR 403: G H

> However the remaining steps in the argument do not follow. If a valid tender be made, a refusal of that tender (whether for good or bad reason, or for no reason at all) does not eliminate the debt in question. The relationship between the creditor and debtor still subsists. The tender is no answer to a claim for the debt unless (as did not happen here) there is a continued readiness to pay, coupled with an actual payment into court (see *Halsbury's Laws of England*, Vol 9 (3rd Ed) Butterworths, para 289 p 169). I

Meagher JA went on to say:

> Moreover, both the solicitors and their client had every reason to refuse the money: a winding up summons was on foot, and there were other creditors. The client would probably have had to return the payment in the event of a winding up order being made (see *Tellsa Furniture Pte Ltd (in liq) v Glendave Nominees Pte Ltd* (1987) 9 NSWLR 254; 13 ACLR 64).

**[13]** Also in the case of *Occidental Life Insurance Co of Australia Ltd v Life Style Planners Pte Ltd* (1992) 111 ALR 261, the Federal Court of Australia held that a refusal of the tender did not constitute a discharge or elimination of the debt due. In case it was found that the applicant 'had every reason to refuse the tender in view of the probability of the payment being a preference in the winding-up of the company'. The same concern is expressed by learned counsel of the respondent here in the acceptance of the tender since an order for winding up of the appellant shall under s 226(4) of the Companies Act 1965, operate in favour of all creditors and contributors.

**[14]** Similarly in this case, the respondent had every right not to accept the purported tender. Further, there was also the questions of the costs indebted to the respondent at the Court of Appeal amounting to RM106,869.33, as stated in the affidavit of debts in the list of parties attending the hearing of the petition. The purported tender made by the appellant did not include this debt, thus rendering it as not a valid tender.

**[15]** For these reasons, we dismissed this appeal with costs, and affirmed the order made by the High Court.

*Appeal dismissed with costs.*

Reported by Dipendra Harshad Rai